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Martin Hogg

XXIV. Scotland

A. Legislation

1. Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019, asp 4

1 This statute makes amendments to the Damages Act 1996, adding in new sections B1, 2B–J, and 4A–B, as well as new subsections to sec 2. The Damages Act 1996 addressed two main issues: (a) the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury (such return to be deducted from the amount awarded);[1] and (b) a power of the courts to award damages for personal injuries wholly or in part in the form of periodical payments, as well as ministerial guarantees of such payments which were to be made by public bodies.

2 The additional provisions added by this new Act include: (a) further rules allowing, in some cases, the assumed rate of return from the investment of damages to be varied from that specified in rules of court; (b) a power given to courts to order periodical damages payments in the absence of the consent of the parties to do so; (c) a power given to courts to specify in what form periodical damages payments are to be made as well as a power to require the payer of damages to take specified action to secure continuity of payment; (d) provisions allowing, in certain circumstances, for the variation or suspension of both agreed and court-ordered periodical damages payments; and (e) restrictions on the entitlement to assign a right to receive a specified portion of periodical damages payments.

3 The right to periodical damages payments in respect of personal injuries, rather than simply the receipt of a once-and-for-all damages payment, is a useful, flexible feature of the modern law of damages. However, the operation of a

1 This is an important aspect of damages awards. The courts work from a principle that an injured party should receive 100% compensation for injuries sustained, no more and no less. When assessing losses that will arise in the future, courts are required to take account of the fact that, because a damages award can be invested, it is necessary to discount from the amount to be awarded the expected rate of return on such an investment. The relevant provisions of the Damages Act 1996 stipulate the mechanism for calculating this rate of return.

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scheme allowing for damages payments over an extended period of time has thrown up complications and contingencies which it was thought sensible to address in these new provisions. The specific new rule that periodical payments can be ordered by a court without the parties' mutual consent was implemented following public consultation by the Scottish government. The courts in England and Wales had already been empowered to impose such an order.

4 One interesting comparative feature of the rules relating to the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury is that the discount rate applied in England and Wales has recently diverged from that used in Scotland. In Scotland, the rate has recently been confirmed as remaining at −0.75%;[2] in England and Wales, the rate was reduced as of 5 August 2019 to −0.25%. One UK law firm, noting this divergence, has commented that:

> 'We modelled a hypothetical but realistic case of a 17-year old needing medical care costing £ 150,000 pa. The difference in rates would mean, all other things being equal, a higher payment of £ 2.6 million in Scotland ... The extra costs for insurers in meeting these claims could lead to higher insurance premiums in Scotland than in England & Wales.'[3]

5 It is interesting that the UK Government, in its review of the rate for England and Wales, stated that '[t]he current rate of minus 0.75% has led to concerns that claimants were being substantially over-compensated, increasing financial pressure on public services that have large personal injury liabilities, particularly the NHS'.[4] Evidently neither this nor the possible impact on insurance premiums was thought to be of sufficient concern for the Scottish Government.

6 The new provisions are mostly not yet in force; they will enter into force on a date to be appointed.

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2 Government Actuary's Department, 'The Personal Injury Discount Rate: Review and determination of the rate in Scotland by the Government Actuary', 27 September 2019.

3 Rachael Henry and Alistair Kinley (of law firm BLM), Scotsman newspaper, 13 January 2020.

4 See <https://www.gov.uk/government/news/lord-chancellor-announces-new-discount-rate-for-personal-injury-claims>.

B. Cases

1. *Commodity Solution Services Ltd v First Scottish Searching Services Ltd* (Sheriff Appeal Court, 4 February 2019, [2019] SAC (Civ) 4, 2019 SC (SAH) 41): Whether Professional Searcher of Public Register Owed a Duty of Care for Financial Losses Caused through Failure to Notify Security over Property

a) Brief Summary of the Facts

7 The pursuers successfully sued a debtor (Mr Gardner), who was the owner of a house, obtaining a court order for payment of £ 50,000. As a means to securing the sum owed, they registered an inhibition (a legal instrument forbidding the sale or other alienation of the house) in the public Register of Inhibitions and Adjudications ('the Register'). In 2012, when Mr Gardner sought to sell the house to his son (who knew nothing of the existence of the inhibition), the defenders (a company of searchers of public registers) were engaged by the son to carry out a search of the Register. Their search failed to disclose the inhibition in place over the property. The house was sold to the son, who became the registered owner of it. As he bought it in good faith and for consideration, the inhibition ceased to have effect. The pursuers were unable to recover their debt from Mr Gardner. They raised an action against the defenders, arguing that the defenders had been negligent in not identifying the inhibition and that this was in breach of a duty of care owed to them by the defenders. The defenders argued in reply that they owed no duty of care to the pursuers.

8 At first instance, the court held that a relationship of proximity existed between the defenders and the pursuers, that the pursuers' losses had been foreseeable, and that it was fair and reasonable for a duty of care to be imposed on the defenders. The sheriff ordered an examination into the amount of the loss suffered by the pursuers. The defenders appealed against the decision.

b) Judgment of the Court

9 The Sheriff Appeal Court held: (1) the defenders had assumed a responsibility in delict to the class of person who would be affected by the undertaking of their task, namely any creditor in whose favour an inhibition had been registered;

(2) viewed objectively, there was a relationship between creditors who had registered an inhibition and searchers given the task of finding such inhibitions. The fact that, subjectively, the searchers were unaware of that relationship, because they did not carry out the search with care, did not mean that there was no relationship as a matter of law; and (3) as to the fairness and reasonableness of imposing a duty of care: there would be little incentive on searchers to carry out searches with care if no such duty existed; the liability of the searchers could never exceed the value of the property being searched against, whether that liability were owed to the purchaser or the inhibiting creditor; and searchers were able to insure against the risk, whereas an inhibiting creditor could not. It was therefore fair and reasonable for a duty of care to be imposed on the defenders.

In consequence, the appeal court refused the defenders' appeal, ordering a proof before answer (a trial of the facts, before application of the applicable law) to be held. **10**

c) Commentary

The judgment concerns one of the most controversial areas of the law of delict, namely the imposition of liability for pure economic losses. In this case, the defenders had not been directly engaged by the pursuers, had had no communication with them, and did not know their identity. In those circumstances, one can appreciate why the defenders sought to argue that they were not in a relationship of proximity with the pursuers and should not therefore be held to have owed them any duty of care. **11**

In the most discursive of the three judgments of the appeal bench, Sheriff Braid considered Lord Reed's guidance in determining whether delictual liability should be imposed on the facts of any given case (as set out in the 2018 Supreme Court case of *Robinson v Chief Constable, West Yorkshire Police*[5]). He considered that this new approach could be broken down into four stages: (1) ask whether the case is novel; (2) if it is not, apply established principles; (3) if it is, then the nearest analogous case should be looked to for assistance; (4) having found the nearest analogous case, decide whether or not to extend the law.[6] **12**

5 [2018] United Kingdom Supreme Court (UKSC) 4.

6 See para [31].

13 Sheriff Braid's analysis that the case was a novel one[7] strikes this observer as correct: there was an absence of reliance on any specific acts of the defenders (albeit that one might say that creditors whose debts are backed by an inhibition are relying, in a very general sense, on searchers of public registers undertaking their task properly) as well as an absence of any subjectively understood relationship between the parties. There have been a few other cases where reliance on specific acts has been absent (Sheriff Braid notes among them *White v Jones*[8]), but an absence of both such reliance and of a subjectively understood relationship between the parties is where the novelty lies. This made identifying the nearest analogous case crucial, as how near the analogy was would be highly relevant to whether the proposed extension of liability might be too great.

14 The nearest analogous case was thought to be *Ministry of Housing and Local Government v Sharp*,[9] in which a (falsely stated) clear report of an entry in a public register of land charges was given by the registrar, following a negligently conducted search by a clerk seconded to the registrar's office. The result of the incorrectly stated position in the register was that the plaintiff lost its right to make a claim against a purchaser of land. The question was whether either the registrar or the clerk's employer was liable to the Ministry, the Court of Appeal holding that only the clerk (and hence, vicariously, his employer) was liable. In the later case of *Customs and Excise Commissioners v Barclays Bank*,[10] Lord Mance had said of the *Sharp* decision that '[i]t would be unjust if no compensation could be obtained for the adverse consequences on property rights of negligence of an official performing such a service in the public interest'.[11]

15 Sheriff Braid's conclusion was that the *Sharp* case was sufficiently analogous to warrant an extension of liability, concluding that (1) the searchers in the case before him should also be deemed to have assumed a responsibility for the task they were undertaking to the pursuers (respondents), and (2) there was, in fact, a relationship between them and creditors affected by their search (even though they were unaware of it).[12] On the persuasiveness of this reasoning

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7 See para [32].

8 [1995] 2 Appeal Cases (AC) 207; [1995] 2 Weekly Law Reports (WLR) 187; [1995] 1 All England Reports (All ER) 691.

9 [1970] 2 Queen's Bench (QB) 223; [1970] 2 WLR 802; [1970] 1 All ER 1009.

10 [2006] United Kingdom House of Lords (UKHL) 28; [2007] 1 AC 181; [2006] 3 WLR 1; [2006] 4 All ER 256.

11 At para 110.

12 On the first point, he reasoned that 'the imposition of a duty of care would maintain the coherence of the law, since the respondents were entirely reliant, for the efficacy of their inhi-

hangs the correctness of the decision reached. Looked at through the lens of incrementalism, it may well be that the extension of liability was justified: it does not seem a great leap to impose delictual liability on private searchers for the carefulness of their search, if such liability has already been imposed on a clerk conducting a search for the registrar (*Sharp*) or on a solicitor for disappointed beneficiaries under an invalid will (*White*). Where legitimate concern may lie is in the very existence of an incremental approach to extending negligence-based liability. While doubtless an approach designed to demonstrate that the courts are not being too radical, incrementalism does not guarantee that the end result will be liability which is kept within reasonable bounds. A starting point which has been developed by, say, ten consecutive incremental extensions may lead to an end result which would have been of great concern to those surveying the law from the starting point. Without being anchored in some principles, rather than just case facts, it is hard to see how an incremental approach will ultimately be satisfying.

This concern was highlighted by one of the appeal bench, Sheriff Principal Pyle, at the start of his judgment, when he observed: **16**

> 'In an article published in 2009 … Lord Hope of Craighead wrote at length about the considerable contribution to Scots law of the late Prof Bill Wilson … Lord Hope described the professor's lectures on delict and recalled his memorable conclusion on the law of negligence: "There is no real law here, beyond that which is to be found in the actual cases." That was in 1963. It seems to me that little has changed. Indeed, as Lord Hope pointed out (p 318), Lord Hoffmann declared 36 years later that no one can pretend that the existing law of negligence is founded upon principle …'[13]

bition, on a searcher of the register finding it and reporting its existence to a potential purchaser. Additionally, the appellants could be said to have voluntarily taken on the task of searching the register (for profit), and, as such, to have assumed responsibility to the class of persons affected by that task, namely, inhibiting creditors whose inhibition were on the register.' [para 45]. On the second point, he argued that 'viewed objectively, there was in fact a relationship between creditors who had registered an inhibition, and the searchers tasked with finding them. The fact that, subjectively, the searchers were unaware of that relationship, because they did not carry out the search with care, does not mean that there was no relationship as a matter of law … the very function of the search was to discover the existence of inhibiting creditors who were there to be found, and having regard to the fact that the appellants voluntarily undertook the search, in my view that does give rise to [a] sort of special relationship …' [para 45].

13 Para [2].

17 Sheriff Pyle went on[14] to quote directly from Lord Hope's 2009 article:

> 'Nowhere has the influence of the English approach been more keenly felt than in the development of the law of negligence. Had its development been left in the hands of Scottish jurists it might have been directed to issues of principle. But, as Bill Wilson pointed out in his valiant attempts to make sense of the authorities, the English approach has been to develop new categories of negligence incrementally and by analogy with established cases ...This approach leads to decisions which are influenced not by principle but by policy.'[15]

18 The clear impression is conveyed that, while Sheriff Pyle felt obliged to adopt the steer of English law and apply an incremental approach to negligence-based liability, it left him with a feeling of unease. That sense of unease is not surprising: malleable and woolly concepts like assumption of responsibility and proximity, when tied to incrementalism, are immensely challenging for a principled exegesis and development of the law.

2. *Khan v Hussain* (Court of Session (Outer House) 8 February 2019, [2019] CSOH 11, 2019 SC 322): Whether Pursuer's Claim against his Accountant for Financial Losses was Barred by the Rule *ex turpi causa non oritur actio*

a) Brief Summary of the Facts

19 The pursuer, a provider of financial services regulated by the Financial Services Agency ('FSA'), had disciplinary proceedings brought against him by the FSA. He was found to be in breach of financial regulations by having knowingly submitted a personal mortgage application containing false and misleading information about his income in the form of false payslips and by providing further false information when the investigation into his conduct was underway. The pursuer's authority to perform certain functions was withdrawn by the FSA. The pursuer subsequently raised an action against the defender, his accountant, for breach of contract and professional negligence, claiming his loss of earnings resulting from the FSA's sanction. He argued that the offending pay-

14 In para [3].

15 Quoting from Lord Hope of Craighead, 'The Strange Habits of the English', in Stair Society vol 54, Miscellany VI, at 317.

slips had been created by the defender on the defender's advice and that they represented sums the defender had advised the pursuer he was entitled to draw down from a company he owned and directed.

The defender argued in his defence that: (1) as the pursuer had been subject to sanctions by the FSA, it would be inconsistent and contrary to public policy to allow the pursuer to attempt to pass on the consequences of his own wrongdoing to the defender: *ex turpi causa non oritur actio*, and (2) it would have been impossible for the pursuer to have insured against the consequences of FSA disciplinary sanction, and by the same token he should not be permitted to sue in negligence or contract in respect thereof. 20

b) Judgment of the Court

The judge (Lord Ericht) dismissed the pursuer's claim, holding that the *ex turpi causa* rule (that one cannot recover in respect of damage which is the consequence of one's own criminal act) was not limited in application to the consequences of sentences imposed for criminal acts: it extended to sanctions implied by a regulator. While there might be circumstances in which the policy of the *ex turpi causa* rule had to defer to some other public policy, such circumstances could not arise where a person was disciplined for his own dishonest conduct. In this case, the pursuer had previously made a dishonest representation in relation to a mortgage application which pre-dated the production of the reference and payslips by the defender. 21

c) Commentary

The significance of the case lies in the court's clear view that the *ex turpi causa* rule is applicable not just to the results of conduct which have been judged criminal by a court of law but equally to the consequences of a finding of dishonest conduct by a statutory regulator. Scottish jurisprudence has not thrown up many cases on the *ex turpi causa* rule, but there was plenty of English case law on which the judge in this case could rely in reaching his decision. 22

A clearly analogous English case was that of *Safeway Stores Ltd v Twigger*,[16] in which the Office of Fair Trading (OFT) had imposed a regulatory fine on the 23

16 [2010] EWCA (Civ) 1472; [2011] 2 All ER 841.

claimant for anti-competitive practices. That was held to bar Safeway from making a claim in respect of the value of the fine against those employees and directors responsible for the decision to engage in the practices. Lord Ericht approved of the remark by Longmore LJ in *Safeway* that:

> 'The rationale of the maxim [*ex turpi causa non oritur actio*] is the need for the criminal courts and the civil courts to speak with a consistent voice. It would be inconsistent for a claimant to be criminally and personally liable (or liable to pay penalties to a regulator such as the OFT) but for the same claimant to say to a civil court that he is not personally answerable for that conduct.'[17]

24 Lord Ericht found both the case analogous and the reasoning of Longmore LJ persuasive. The decision appears correct and provides useful Scots authority on the application of the *ex turpi causa* rule to the consequences of sanctions applied by public regulators.

3. *Sabet v Fife Council and Milne* (Court of Session (Outer House) 19 March 2019, [2019] CSOH 26, 2019 Scots Law Times (SLT) 514): Whether Local Authority Liable for Breach of Statutory Duty to Householder for Flood Damage

a) Brief Summary of the Facts

25 The pursuers' house was severely damaged by flooding from a river in Fife. The pursuers raised an action for damages jointly and severally against (1) the local authority (Fife Council), in respect of alleged breach of duties under secs 56 and 59 of the Flood Risk Management (Scotland) Act 2009 ('the 2009 Act'), and (2) the neighbouring owner of a weir (a kind of low dam) in the river in respect of alleged nuisance on his part. The pursuers averred that: (1) the flood would not have occurred had the weir not been blocked with accumulated debris; (2) the 2009 Act imposed duties upon the local authority which were owed to the pursuers in the circumstances of the case. A breach of those duties gave rise to a private law right of action in favour of the pursuers to recover damages; and (3) the accumulation of debris in the weir amounted to a nuisance caused by the

17 Longmore LJ at para [16].

neighbouring landowner's fault. It was the duty of the landowner in the use of his property, including the weir, to avoid causing damage to neighbouring property such as the pursuers' house.

The local authority argued in its defence that: (1) the provisions of the 2009 Act were designed to provide a general power in relation to the management of flood risks, were wholly permissive in nature, and were directed to the management of risks which, but for the provision concerned, would not exist; and (2) there was no class of beneficiaries which might be intended to obtain a statutory benefit under the Act. The neighbouring landowner argued that: (1) the pursuers had made no relevant averments of fault on his part: the claim, which concerned flooding during a period of torrential rainfall, did not allege any omission by the second defender from which negligence might be inferred; (2) he owed the pursuers no duty to take positive steps to maintain the weir, nor remove debris therefrom; and (3) there was no basis in law for a positive duty to maintain an artificial structure so as to alter and mitigate against the otherwise natural flow of water. **26**

b) Judgment of the Court

The judge (Lord Ericht) dismissed the action against the local authority and allowed a proof before answer (a trial of the facts followed by a debate on the application of the law to them) in respect of the action against the neighbouring landowner. **27**

In relation to the claim against the local authority, he held that: (1) in enacting sec 56 of the 2009 Act, Parliament had not intended to create a duty enforceable by a private individual against a local authority, rather the section had created a general administrative power; (2) by contrast, sec 59 of the Act *did* impose a duty on the local authority to carry out works, but the works to be undertaken had to be specified in a schedule (prepared under sec 18 of the 2009 Act). No such schedule of works had been prepared in relation to the weir, and so there could be no breach of any sec 59 duty, whether or not such a breach might give rise to a private law clause of action – on which matter the judge expressed the *obiter* view that such a duty might be capable of being owed to a limited class of people. **28**

In relation to the claim against the neighbouring landowner, the judge held that the pursuers had pled *culpa* (fault) on the landowner's part, through his alleged failure to maintain the weir (including through removal of accumulated debris). These averments of fault were sufficient to justify the ordering of a proof before answer. **29**

c) Commentary

30 The nature of the claim against the neighbouring landowner in nuisance was not exceptional and so no discussion of it is offered here. In relation to the private law delictual claim for alleged breach of statutory duty by the local authority, there is a lot of Scottish and English jurisprudence considering when such a claim might arise. The foundational modern case in the field is the English case of *X (Minors) v Bedfordshire County Council*,[18] and the approach it sets out is generally of such claims being disallowed, save in a clearly delineated exceptional circumstance:

> 'The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty.'[19]

31 Lord Ericht proceeded to examine a few Scottish cases in which the possibility of such private law actions against public bodies had been considered, with mixed outcomes for the pursuers in those actions. Prior decisions about such matters are of very limited assistance however, as the correct result in each case will turn on the wording of the specific statute at issue and the class of persons to which the pursuer belongs.

32 In this case, Lord Ericht did not strictly require to reach a conclusion on whether a private law claim might arise against the local authority: given that the duty could only be triggered by the narration in a specific statutory form of remedial works to be carried out, and that such a form had not existed in relation to the locus of the flooding, that put an end to the question. However, his Lordship's *obiter* remarks will be of interest for possible future cases involving similar facts. His view was that, were the preconditions for the existence of the duty to be fulfilled, 'then it seems to me that there would be protection for a limited class, namely the persons who would be protected from flooding if that particular set of works was completed.'[20] This seems a plausible assessment of the likelihood that a breach of the sec 59 duty could give rise to a private law claim in delict: not only is there no statutory penalty provided for breach of the duty

18 [1995] 2 AC 633; [1995] 3 WLR 162; [1995] 3 All ER 353.

19 Lord Browne-Wilkinson in *X v Bedfordshire*, [1995] 2 AC at 731.

20 Para [42].

(which, had there been, might have been taken to exclude any private law claim), but it seems apparent that those who will be affected by flooding must necessarily belong to a class of persons limited by the geographical proximity of their properties to the specific source of the flooding. The purpose of the duty is, it can be suggested, evidently the protection of those who would suffer from the effects of flooding. So, while the decision in this case does not give us an authoritative answer to the question at issue, the musings of Lord Ericht are helpful, albeit relatively short given their *obiter* nature.

4. *Hughes v Turning Point Scotland* (Court of Session (Outer House) 17 May 2019, [2019] CSOH 42, 2019 SLT 651): Whether a Homelessness Charity Owed a Duty of Care in Respect of the Safe Admission to its Facility and Treatment of an Alcoholic who Died from a Seizure

a) Brief Summary of the Facts

Turning Point Scotland (the defender) was a charity which operated a facility in 33
Glasgow providing a service for people who were homeless or sleeping rough and experiencing a crisis, including as a result of addiction to alcohol. In July 2013, Mr Hughes, a thirty-four year old man with a history of alcoholism, attended the facility, accompanied by his alcohol support worker. Mr Hughes wished to be accommodated at the facility and to receive assistance in withdrawal from alcohol. He had used the service on previous occasions. The initial assessment of Mr Hughes was carried out by one of the defender's project workers. Following the assessment, Mr Hughes was admitted to a bedroom in the crisis residential unit of the facility. An attempt was also made to obtain alcohol detoxification medication for Mr Hughes, but none could be immediately obtained. Approximately three hours later he was found motionless on the bed and soon afterwards pronounced dead. The cause of death was certified as suspected seizure related to alcohol withdrawal.

Relatives of Mr Hughes raised a claim for damages against the defender un- 34
der the Damages (Scotland) Act 2011 on the grounds that the defender, and separately the project worker (for whose actings the defender was said to be vicariously liable), failed to exercise reasonable care in its dealings with and treatment of Mr Hughes. In particular, the pursuers argued that: (1) the defender (and the project worker) owed a duty of care to not assess or admit someone in Mr Hughes' position to use of its services; (2) failing which, there was a duty to

provide a safe system for his admission and treatment. These breaches of duty were argued to have caused Mr Hughes' death.

35 The defender argued in its defence that: (1) the duty incumbent on a person in the position of the defender was not such as to allow the claim to succeed; (2) in any event, the pursuers had not established that the defender's conduct amounted to a breach of the narrow range of duties averred; (3) the pursuers had not established, on the balance of probabilities, legal or factual causation; and (4) even if there were to be an award of damages, it should be substantially modified to take account of the significant degree of contributory negligence of Mr Hughes.

b) Judgment of the Court

36 The judge (Lord Clark) dismissed the claim against the defender, holding that: (1) it would not be fair, just or reasonable to impose on the defender the general duty to have the safe system contended for by the pursuers; (2) the defender had assumed certain responsibilities towards the deceased – to provide its services to the deceased, including the provision of a bed, and to request medication and to administer it if prescribed – and the deceased had relied upon it undertaking these responsibilities; (3) given the extent of the responsibilities assumed, there had been no breach of those responsibilities by the deceased; (4) as to causation, on the balance of probabilities, the cause of death was sudden, unexpected death from alcohol misuse, presumed to be due to cardiac arrhythmia, and it would be unsafe to conclude that the administration of the prescribed medicine which the defender was to have procured would have prevented the deceased from dying.

c) Commentary

37 There were two principal issues at stake in this case: (1) what exactly had the defender voluntarily undertaken to do in relation to the deceased, Mr Hughes? Ascertaining that would determine the extent of any possible duty of care (and its breach) on the defender's part; and (2) what had been the cause of his death? Was it a sudden, unexpected event, or was it a failure to administer timeously the prescription medicine which the defender had undertaken to procure and administer? A further issue was whether the deceased's own culpable conduct had been in part the cause of his death (the question of contributory negligence).

38 As to the first question, the judge undertook a general survey of the various authorities relating to the imposition of a duty of care in delict, focusing on those cases dealing with an assumption of responsibility. In relation to the pursuers' arguments that there had not been in place a proper system for assessing someone in Mr Hughes' position (a system that would have refused to see him admitted, and instead referred to a hospital as an in-patient), the judge thought this was a novel case: the other authorities relating to such a systems issue related to medical providers (such as hospitals) and so were not analogous to the work of a charity. Those sorts of medical provider had resources to which the defender did not have access. This led the judge to conclude that the imposition of a duty concerning an adequate system of the sort contended for would not be fair, just, and reasonable. This seems a reasonable conclusion in the circumstances.

39 As to the second duty of care point – concerning the extent of the responsibilities which were assumed by the defender – the judge's conclusion again seems reasonable on the facts. The defenders were not running an intensive care system, offering round the clock, close medical supervision of the sick. A member of staff had looked in on the deceased several times during the three hours in which he was at the facility. To have expected uninterrupted bedside care would have exceeded what the defender had held out it was able to provide. As the judge (correctly it is suggested) summed up matters:

> 'the defender did not assume responsibility for the welfare of Mr Hughes as a generality. It did not have control over Mr Hughes in the same manner as a hospital. The defender simply did not have medical and nursing staff of various ranks and roles, and medication, to be taken as having held itself out to provide a safe and comfortable detox.'[21]

40 Given the extent of the duties assumed, it is not surprising that, on the evidence, the judge held there to have been no breach of these duties. The judge found that 'on the evidence Mr Hughes was not at material risk of the effects of alcohol withdrawal in the limited period after his admission'.[22] There had therefore been no need to call an ambulance, and it had been reasonable to seek to obtain a prescription from a doctor through attempts to telephone him.

41 As to the questions of causation and contributory negligence, the first question was whether earlier administration of the medicine being sought (diazepam) would have prevented the death. The conclusion of the judge on this point

21 Para [98].
22 Para [106].

need not be examined further: he held that, on the balance of probabilities, the cause of death had been cardiac arrythmia, and that, because diazepam is not prescribed to prevent cardiac arrythmia, it would not be safe to conclude that earlier administration of the drug would have prevented the death. This seems a reasonable assessment.

42 The finding of contributory negligence (the judge holding that, had the defender been in breach of its duty, the court would have held the deceased to have been 60% contributorily negligent) requires a little more examination. To be applicable, a finding of contributory negligence requires a demonstration that specific conduct of an injured party was both blameworthy and a cause of the party's injuries. The judge's conclusion that the conduct of Mr Hughes had been blameworthy seems to have emerged from judicial observations that:

> 'It was absolutely clear on the evidence that Mr Hughes knew his alcohol consumption to be harmful. He had been admitted to hospital as a result of his alcohol misuse on numerous previous occasions. The evidence of his two sisters supported the view that he was aware of the problems his alcoholism was causing ... His condition as a result of his alcohol consumption was closely connected in time and place, and indeed intermixed with, the allegedly negligent conduct of the defender.'[23]

43 There is a somewhat mixed message conveyed in these remarks: to begin with, it seems as if it is being suggested that it is his dependency on alcohol in general (his alcoholism) which was a blameworthy cause of Mr Hughes' death. However, the latter portion of the quoted remarks (referring to his condition as a result of his alcohol consumption) focuses more on the specific state of drunkenness he was in at the time of his admission.[24] It would have been preferable to have had absolute clarity on what conduct was being assessed as blameworthy. It is quite a different (and probably more controversial) thing to suggest that a pre-existing medical condition (alcohol dependency) can be a blameworthy cause of someone's death; on the other hand, saying that a state of drunkenness on a specific occasion constituted contributory negligence would be a more run-of-the-mill finding, though had this issue been a live one in this judgment, one would have expected to have seen more discussion of how a specific level of blood alcohol can causally contribute to a fatal incident of arrythmia.

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23 Para [115].

24 When admitted to the facility, Mr Hughes had a blood alcohol measurement of 0.15 (a state of very obvious drunkenness). At this level, symptoms include severe impairment to judgment, perception, and major motor skills; very slow reaction time; blurred vision, loss of balance, and slurred speech.

5. *C v Chief Constable of the Police Service of Scotland* (Court of Session (Outer House) 28 June 2019, [2019] CSOH 48, 2019 SLT 875): Whether a Common Law Right to Privacy Exists in Scots Law

a) Brief Summary of the Facts

The petitioners were ten individual police officers against whom misconduct proceedings had been brought under the Police Service of Scotland (Conduct) Regulations 2014. The respondents were the Chief Constable and Deputy Chief Constable of the Police Service of Scotland and a Chief Superintendent of Police appointed under the 2014 Regulations to conduct the misconduct proceedings. **44**

The misconduct proceedings related to messages shared by the petitioners using the electronic WhatsApp messaging system which were sexist, racist, anti-semitic, homophobic, and mocking of disability in nature. The petitioners sought (1) an order declaring that the use of those messages by Police Scotland for the purpose of misconduct proceedings in respect of alleged non-criminal behaviour was both a breach of a common law right to privacy (and therefore actionable in delict) and incompatible with the petitioners' right to respect for their private and family life under art 8 of the European Convention on Human Rights (ECHR); and (2) an interdict preventing the respondents from conducting or maintaining any misconduct proceedings against the petitioners on the basis of, or involving the use of, the messages. **45**

b) Judgment of the Court

The judge (Lord Bannatyne) held that: (1) In English law, the tort of breach of confidence had developed into a tort of misuse of private information, Convention rights having been used to develop the common law in this way;[25] (2) this developmental approach should find favour in the Scottish courts. Adopting the same approach, it should therefore be affirmed that there was a right to privacy at common law in Scotland. The right was 'a core value and one which is inherent in a democratic and civilised state';[26] (3) what limited case law there was in Scottish jurisprudence also supported the affirmation of such a right to pri- **46**

25 Para [113].

26 Para [106]. On the existence of the right, see also paras [114]–[115] and [126].

vacy;[27] (4) the use of the WhatsApp messaging service by a member of the public would give rise to a reasonable expectation of privacy in relation to the messages shared on the app;[28] (5) however, in order to maintain confidence by the public in the impartial discharge of their duties, police officers necessarily consent to limitations on their right to privacy consistent with the maintenance of such public confidence;[29] (6) the attributes of the petitioners (as police constables) was one of the circumstances to which the courts could have regard in considering the reasonable expectation of privacy;[30] (7) the content of the messages in question could be regarded as potentially informing the issue of breach of standards in circumstances calling into question the impartial discharge of the petitioners' duties. The petitioners in these circumstances had no reasonable expectation of privacy;[31] and (8) therefore no right of privacy had existed in the circumstances, either at common law or under art 8 ECHR.[32] Given these conclusions, the judge dismissed the petition.

c) Commentary

47 There have been arguments for some time that Scots law ought to recognise the existence of a right to privacy, the breach of which would be actionable as a delict.[33] Such arguments have drawn on the ECHR, but not exclusively, and any such common law right would have an existence separate to a right deriving from the ECHR. The Scottish courts have, however, been slow to recognise such a right, having instead relied upon the more limited right to confidentiality (traditionally resting upon an alleged relationship and duty of confidentiality between the relevant parties).

48 As discussed by the judge in this case, the duty of confidentiality has been developed beyond its original boundaries by the courts in England and Wales. Thus, in *Campbell v MGN*,[34] Lord Nicholls remarked that respect for individual

27 Para [118] f.
28 Para [150].
29 Para [164].
30 Para [166].
31 Para [167].
32 Para [173].
33 See, for instance, *M Hogg*, Privacy: A valuable and protected interest in Scots law, 1992 SLT (News) 349; *M Hogg*, The Very Private Life of the Right to Privacy, 1994 3(3) Hume Papers on Public Policy 1.
34 [2004] UKHL 22; [2004] 2 AC 457.

privacy 'lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual',[35] though tempering that remark with the further observation that '[i]n this country, unlike the United States of America, there is no over-arching, all-embracing cause of action for "invasion of privacy"'.[36] This further comparative observation was perhaps intended as relevant to the appropriate scope of any English action: rather than a 'right to privacy', Lord Nicholls preferred characterising the developments of the English law as giving rise to a tort of 'misuse of private information'.[37] It is interesting that, in this judgment, Lord Bannatyne does not seem to share possible concerns about the adoption of an expansive nomenclature: he describes Scots law as recognising a 'right to privacy', with (one presumes) the relevant delictual description being a delict of breach (or invasion) of privacy. He does not specifically limit the right to private information.

The full details of this newly recognised delict of breach of privacy are not **49** explored in this judgment – for instance, we do not know whether the new action has simply acquired all of the defences of the old action for breach of confidence, or whether further new defences might conceivably be appropriate. However, from the facts and decision of this case, we do know that whether a right to privacy exists is contextual, and that part of that context is the 'attributes' of the party petitioning for a declaration that its right to privacy has been breached. Such attributes include whether the petitioner holds a public office, a police constable being such an office, and whether the conduct disclosed in an alleged breach of privacy is relevant to the discharge of the duties of that public office. That seems entirely appropriate, for the public policy reasons discussed by the judge, and justifies the judge's ruling on the petitioners' case.

It will be important to observe how the new common law right to privacy **50** develops in subsequent decisions of the courts. The existence of the right is very unlikely to be challenged by higher courts, but its application to aspects of privacy other than private information have yet to be deliberated upon by the courts.

35 Para [12].
36 Para [11].
37 Lord Nicholls, *Campbell*, at para [14].

6. *Ardmair Bay Holdings Ltd v James Craig* (Court of Session (Outer House) 31 July 2019, [2019] CSOH 58, 2019 SLT 1011): Whether a Statement of Opinion Amounts to an Actionable Misrepresentation

a) Brief Summary of the Facts

51 The pursuer entered into an agreement with the defender and others to buy the whole share capital of Craig Group Ltd ('the company') for approximately £82 million. The defender was the chairman of, and a substantial shareholder in, the company. On the eve of the signing of the agreement, one of the subsidiary companies of the company ('North Star') received an email (with an invitation to treat [ITT] attached) from a client relating to North Star's two most lucrative contracts. The communication indicated that the client might not exercise options to extend the contracts on the same terms. The defender did not disclose either the receipt of the email or the terms of the ITT to the pursuer at that time. The agreement was signed the next day.

52 A few months later, when the contracts to which the ITT related were not extended, the pursuer became aware of the email and its timing, as well as the contents of the ITT. The pursuer raised an action alleging that the defender had (1) breached a number of warranties in the agreement, and/or (2) engaged in wilful concealment of a material matter, or (3) failed to correct a representation made prior to conclusion of the agreement (concerning the defender's expectation about certain financial matters continuing to prevail because the options to extend the contracts would be exercised) when that representation became untrue (as the pursuer contended it had) upon North Star's receipt of the ITT. As a consequence, the pursuer alleged it had sustained a loss in the form of paying substantially more than it otherwise would have for the shares in the company (estimating its loss at about £16,800,000). The defender denied all of the grounds of liability and advanced alternative interpretations of the warranties. In respect of the claims based on the agreement, the defender also relied on an 'entire agreement clause' in the agreement, which specified that the agreement comprehensively defined the parties' rights (and therefore excluded any claims not deriving from those rights, including any based in delict).

b) Judgment of the Court

53 The judge (Lady Wolffe) held that: (1) the defender had been in breach of the warranties under the agreement (this contractual point is not considered further

below); (2) the alleged misrepresentation amounted to no more than a statement of opinion by the defender and did not have the necessary actionable quality of a statement or representation of fact; and (3) the arguments on wilful concealment were closely related to, if not dependent on, those advanced in respect of the misrepresentation case and, given the conclusion on the latter, the case on wilful concealment was also bound to fail. As a result of these findings, the judge dismissed the claim in so far as based in delict but allowed it in so far as based upon breach of warranty.

c) Commentary

The delictual relevance of this case lies in its analysis of what sort of statement can amount to an actionable misrepresentation, and whether a representation needs to be corrected if and when the information it conveys no longer holds good. **54**

In this case, the pursuers (the buyers of the company) had asked about day rates for certain vessels which were operated by the subsidiary company, North Star, framing their request as one for the management team's 'expectation and rationale' for the day rates of those assets. The reply was to the effect that, as the vessels had been specifically built to meet the tonnage requirements of the subsidiary company's client, 'we believe that the ... vessels are the only vessels capable of meeting this specific requirement. As such the rate expectations would be in line with the projected expectations'.[38] The judge in this case emphasised the terminology used in this statement, noting the use of the words 'believe', 'expectation', and 'projected expectation', concluding that this was a statement of opinion and not a statement or representation of fact. Given the language used, this seems a reasonable assessment of the nature of the statement. She further noted that, when the email (and ITT) were received, the result of what was conveyed meant that the factual statement underpinning the rationale (that the vessels were bespoke vessels commissioned to meet the client's needs) continued to be correct; all that was affected was the certainty of the stated expectation. **55**

This finding was a crucial one because in Scots law (as in English law), statements of opinion cannot ground a claim for misrepresentation. However, the cases exempting mere opinions from liability require an important caveat to be borne in mind: the English courts have held that, in tort law, 'any opinion **56**

38 See para [248].

given carries with it a representation that the maker of the statement has some genuine factual basis for the formation of that opinion'[39]; where such genuine factual basis is absent, then the statement may be actionable. Putting it another way, the courts have said that, when making a statement of belief, the maker is required to be honest. A belief stated in good faith is deemed to be honestly made.[40] If, in addition to this, one also bears in mind that, where a representation ceases to be accurate because circumstances have changed since its making, there can be a duty to correct the statement made, then the assessment of the purser's misrepresentation claim in this case might be somewhat more complicated than simply categorising it as an opinion and *ipso facto* discounting it. If the defender's statement was, when issued, made honestly/in good faith, the subsequent notification by the client that the subsidiary company's contracts might not be renewed could arguably mean that the statement could no longer continue to be asserted honestly/in good faith. On this point then, perhaps the matter was more complex than suggested by the judge.

57 Despite the above observations, given the judge's further conclusion that the entire agreement clause excluded any possible liability for misrepresentation, the outcome would still have been as the judge decided even had the statement of opinion conceivably been actionable in theory (because an honest belief in its truth could no longer be maintained).

7. *Whitehouse v Chief Constable, Police Scotland* (Court of Session (Inner House) 30 October 2019, [2019] CSIH 52, 2019 SLT 1269): Whether the Lord Advocate was Immune from Civil Suit in Relation to an Alleged Wrongful Detention[41]

a) Brief Summary of the Facts

58 The pursuer, an administrator of a Scottish football club, had twice been arrested and detained overnight by police investigating his alleged participation

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39 Longmore J, in *Credit Lyonnais Bank Nederland v Export Credit Guarantee Department* [1996] 1 Lloyd's Reports 200 at 216.

40 See *Economides v Commercial Assurance Co plc* [1997] QB 587.

41 The background facts to this case are as related in the 2018 Yearbook, which discussed an earlier stage of this litigation.

in a fraudulent scheme and an attempt to pervert the course of justice. Some time later, when the Crown announced that no charges were to be brought, the pursuer raised an action against (i) the Chief Constable of Police Scotland, (ii) the Procurator Fiscal for Specialist Casework in the Crown Office, and (iii) the Lord Advocate, seeking damages in respect of the alleged wrongful detention of the pursuer. At first instance,[42] the judge held that: (1) the Lord Advocate enjoyed a common law immunity against civil suits, hence the common law claims against him were dismissed; and (2) a proof before answer (a trial of the facts, before a determination of the law) would be allowed in relation to the claim against the Chief Constable.

59 The pursuer reclaimed (appealed) to the Inner House of the Court of Session, arguing that: (1) *Hester v Macdonald*,[43] the precedent holding that the Lord Advocate was immune at common law from civil suits, had been incorrectly decided; (2) even if that precedent had been correctly decided, (i) it did not apply to acts which were malicious and without probable cause, damages being available for such acts, and (ii) it should be overruled on the basis that the policy considerations which existed at the time of the decision were no longer applicable in the modern era.

b) Judgment of the Court

60 The appeal bench held that: (1) *Hester v Macdonald* had been wrongly decided and should be overruled; and (2) in relation to his acts, the Lord Advocate and those for whom he was responsible were generally subject to the same rights and duties as other public officials in the conduct of their duties. Where there was proof of malice and lack of probable cause in relation to the general acts of a public official, the matter was actionable. In consequence, the appeal bench ordered a proof before answer.

c) Commentary

61 This decision of the Inner House is a significant one, as it opens up the possibility of the Lord Advocate – the Crown officer with ultimate responsibility for all criminal prosecutions in Scotland – being open to a civil claim for damages in

42 [2018] CSOH 93.

43 1961 SC 370; 1961 SLT 414.

delict. Such a momentous decision clearly has far-reaching potential, so it is unsurprising that the Inner House decision was delivered by an appeal bench of five judges (rather than the standard three) and stretches to 156 paragraphs.

62 Why did the appeal bench think that the law had taken a wrong turn in *Hester* in declaring the Lord Advocate absolutely immune from civil suit? They pointed out that, prior to *Hester*, there had been no immunity for the Lord Advocate in the event of a malicious prosecution: as the Lord President put it, the Lord Advocate would have been 'liable, vicariously or otherwise, for a solemn prosecution carried out maliciously and without probable case'.[44] Reviewing the prior authorities, the appeal bench concluded that the step taken to create a blanket immunity in *Hester* was not supported by those authorities. The appeal bench therefore chose to restore the view of the law pre-*Hester* that, as stated above, where there is both proof of malice and a lack of probable cause in relation to the general acts of a public official, the matter is actionable.[45]

63 The Lord President adds that, even had it not been his view that the prior position should be restored because *Hester* was wrongly decided, a comparative survey of the position adopted in other legal systems (he mentions England and Wales, Canada, Australia, and Continental Europe), '[t]he balance, especially in regimes in which expenses may be awarded and caution [ie security] required, favours redressing the wrongs of dishonest officials, even if there may be rare cases in which unfounded actions are sought to be pursued'.[46] He concludes that, even if *Hester* had not been wrongly decided, 'it would have been overruled on the basis that public policy no longer supported its continued application'.[47]

64 The immediate consequence of the appeal court's decision was that, the blanket immunity having been swept away, it was therefore possible for a proof before answer to be ordered by the court to assess whether any claim against the Lord Advocate for wrongful detention based on malice and lack of probable cause could be demonstrated. Proof of that looks unlikely on the facts, but we shall have to await the outcome of the courts' further deliberations for confirmation on that point.

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44 Para [76].

45 Para [90]. The Lord President adds that '[i]n defamation claims, however, there is an exception, whereby, as with all legal representatives and the judge, there is absolute privilege for things said or done in court.'

46 Para [110].

47 Para [113].

8. Personal Injury

65 As in other years, the reported personal injury cases are mostly a mixture of road traffic accidents, injuries sustained in the workplace[48] or in the course of employment,[49] defective products,[50] and medical malpractice.[51]

66 Cases worthy of note include the following. In *Fairley v Edinburgh Trams Ltd*,[52] two cyclists who had fallen off their bikes and suffered injuries when crossing tram tracks in Edinburgh alleged that their injuries were the result of the faulty design of the tracks. As the claims followed media reports that a number of cyclists had been complaining about the design of several sections of the Edinburgh tram tracks, the case generated a degree of local public interest. The cyclists were successful in their claims, the court holding that the road layout and tram tracks at each location had posed a relevant hazard to each of the pursuers, one which would not have been obvious to either cyclist.

67 In *McLean v Fairfield Shipbuilding Ltd*,[53] relatives of a man who had died from a mesothelioma of the pleura argued that they were entitled to a jury trial.[54] The defenders opposed this, arguing that such entitlement was precluded by the Prescription and Limitation (Scotland) Act 1973. The court held that, on a proper reading of the Act, the claim of an entitlement to a jury trial was a valid one.

68 A noteworthy case in relation to claims for psychiatric loss was the Sheriff Court decision in *Weddle v Glasgow City Council*.[55] The facts of the case arose out of a tragic incident in Glasgow, when the driver of a local authority refuse collection vehicle had blacked out at the wheel, this resulting in the deaths of a number of pedestrians. The claim in this case was raised by a passer-by present

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48 See *Dehenes v T Bourne and Son* 2019 Scots Law Times, Sheriff Court Reports SLT (Sh Ct) 219.

49 Including a claim for damages for psychiatric harm by a former police officer against her Chief Constable: see *K v House, Chief of the Police Service of Scotland* [2019] CSOH 9.

50 See *Hasting v Finsbury Orthopaedics Ltd* 2019 SLT 1411 (alleged defective hip replacement).

51 See, for instance, *Sparks v Western Isles National Health Service* [2019] Sheriff Court Edinburgh (SC Edin) 70 (alleged failure to diagnose and treat gangrene, resulting in amputation of a toe).

52 [2019] CSOH 50.

53 [2019] CSOH 33.

54 Jury trials are often favoured by pursuers in those types of personal injury action where their use is permitted, out of a belief that juries tend to be more favourable to injured parties in relation to the quantum of damages.

55 2019 SLT (Sh Ct) 206.

near the scene of the accident who went on to suffer psychiatric harm as a result of her trauma. Her argument was that she should be treated as a so-called 'primary victim' and therefore entitled to claim damages for psychiatric harm without the need to demonstrate (as 'secondary victims' do) a close relationship with a primary victim of the accident. The judge held that no duty of care had been owed to her by the driver: because of her distance from the events, she had not been at risk of physical injury; she had only been aware of a relatively small road accident between the refuse collection vehicle and a taxi; she had not seen any pedestrian being injured; and thus any belief on her part that she was in danger was unreasonable. All of that being the case, she was not owed a duty of care in relation to the incident.

69 Finally, *Andrews v Greater Glasgow Health Board*[56] raised the question of the standard of care owed by a junior doctor, and whether his alleged misdiagnosis had made a material contribution to the death of a patient (whose relatives argued that she would have survived had she been properly diagnosed and treated at the relevant time). The defenders (the doctor's employers) argued that the junior doctor had discharged his duty of care by seeking advice from a more senior colleague, and that, even had he been negligent, it could not be demonstrated that, with timely and proper treatment, the patient would have survived. The court held that: (1) the junior doctor had been negligent and that he was required to demonstrate the same standard of care as a more senior doctor; and (2) it was probable that had the patient been properly diagnosed and admitted to hospital earlier, her suspected condition would have been monitored and her life could have been saved. Junior doctors will wish to take note that they cannot escape liability for negligence simply by taking advice from a more senior colleague.

C. Literature

1. *Eleanor Russell*, The bystander and the bin lorry: *Weddle v Glasgow City Council* considered, 2019 Scots Law Times (News) 117–125

70 In this article, the author analyses the case of *Weddle v Glasgow City Council*.[57] The author observes that it was perhaps unsurprising that the pursuer had tried

56 2019 CSOH 21.

57 2019 SLT (Sh Ct) 206, discussed earlier at 62.

to present her position as having been that of a primary victim in relation to the injuries caused when the driver of the local authority refuse collection vehicle blacked out at the wheel: given that the pursuer had no connection to any of those who were physically injured or killed, she was unable to argue that she was a secondary victim entitled to be compensated for the psychiatric injuries she had suffered. In Scots (and English) law, a pursuer may qualify as a secondary victim (and hence may recover for psychiatric harm) only if one of a very limited class of person (spouse, parent, child, etc) having a close tie of love and affection with a primary victim. As that avenue was not open to her, she had tried to argue that she had primary victim status. The author agrees with the court's findings on this point: because she had not been sufficiently close to the locus of the accident, she could not reasonably have feared for her own safety and hence was not entitled to qualify as a primary victim.

2. *Elspeth Reid*, *C v Chief Constable of the Police Service of Scotland*: the right to privacy affirmed, 2019 Scots Law Times (News) 137–140

In this article, the author analyses the case of *C v Chief Constable of the Police Service of Scotland*, discussed above.[58] The author welcomes the fact that the decision has confirmed that a right of privacy exists in Scots law, though adds the caveat that this declaration was 'in the context of misuse of private information'.[59] The author's interpretation of the decision is that the recognition afforded to the right of privacy in the judge was confined to this specific context. **71**

The author offers a cautious interpretation of the decision. In English law, to be sure, Lord Nicholls characterised the emerging tort as one of misuse of private information. However, as was observed earlier, in *C* the Scottish judge preferred to describe Scots law as recognising a 'right to privacy' and not merely a right to the privacy of private information. So, while the context of *C* was indeed informational, there does not seem to be any clear barrier in the judgment to applying the newly recognised right to privacy to non-informational forms of privacy (eg physical forms of privacy). True, as the author suggests, we do not yet know how the new Scottish delict will develop, but there seems to be no reason in principle why a conceptual barrier should be erected between informational privacy and other sorts of privacy. **72**

58 [2019] CSOH 48, 2019 SLT 875. See above at 38 f.

59 At 138.

3. *George Dick*, A Reappraisal of Solicitors' Liabilities to Opposing Parties and the (Further) Retreat from *Caparo*: *Steel and Another v NRAM Ltd*, (2019) 23(2) Edinburgh Law Review 247–253

73 The decision of the United Kingdom Supreme Court in *Steel and another v NRAM Ltd* was considered in the 2018 Yearbook.[60] The case concerned the liability of a solicitor in pure economic loss for statements relied upon by a third party (someone other than her client). The Supreme Court held that she was not liable, no duty of care for the statement having been owed to the third party. In this article, the author writes in favour of the Supreme Court's decision, arguing that an experienced lender such as *NRAM* should have been prudent enough to have checked its records, to which it had had immediate access, rather than relying on the statement of a party who was not its legal adviser.

74 The author also argues that the decision marks a 'further distancing of the Supreme Court from the tripartite test in *Caparo*',[61] that distancing having begun in *Michael v Chief Constable of South Wales*[62] when the court expressed the view that *Caparo* did not mean to lay down a tripartite test requiring (i) foreseeability, (ii) proximity, and (iii) fairness, justice, and reasonableness as necessary elements for the establishment of a duty of care in all cases. In the author's opinion, *Steel* has reinforced the view that the assumption of responsibility test established in the *Hedley Byrne*[63] case is the governing test in cases of pure economic loss.

75 The author's analysis provides a helpful summary of developments in this area. It seems likely, however, that recent developments in relation to the proper approach to establishing liability in negligence cases represent unfinished business, and there may well be further judicial developments in this area in the short to medium term.

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60 [2018] UKSC 13; 2018 SC (UKSC) 141; 2018 SLT 835; [2018] 3 All ER 81; [2018] 1 Weekly Law Reports (WLR) 1190. Discussed in *M Hogg*, Scotland, in: E Karner/BC Steininger (eds), European Tort Law 2018 (2019) 563, nos 7–13.

61 At 251. *Caparo Industries plc v Dickman* [1990] 2 AC 605; [1990] 2 WLR 358; [1990] 1 All ER 568.

62 [2015] UKSC 2; [2015] AC 1732; [2015] 2 WLR 343; [2015] 2 All ER 65.

63 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 3 WLR 101; [1963] 2 All ER 575.